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No. 93-807

IN THE SUPREME COURT OF
THE UNITED STATES
OCTOBER TERM, 1991

STATE OF MICHIGAN,

PAMELA WITHROW,

Petitioner,

vs.

ROBERT ALLEN WILLIAMS, JR.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

IN LIGHT OF THIS COURT'S DIRECTIVE TO REMAND THE CAUSE FOR FURTHER PROCEEDINGS CONSISTENT WITH ITS OPINION ON THE MERITS, SHOULD THIS COURT GRANT CERTIORARI IN ORDER TO ENFORCE ITS OPINION ON THE MERITS WHERE THE CIRCUIT COURT OF APPEALS INSTEAD REMANDS WITH DIRECTIONS TO GRANT A RETRIAL?

FOLLOWING A PARTIAL REVERSAL AND REMAND FOR FURTHER PROCEEDINGS, IS A FEDERAL CIRCUIT COURT OF APPEALS ACTING WITHIN ITS AUTHORITY TO REMAND A CASE IN A MANNER INCONSISTENT WITH THIS COURT'S OPINION ON THE MERITS?

IN THIS CASE, GIVEN THE EXISTENCE OF A MIRANDA VIOLATION, IS THE QUESTION WHETHER THE INTRODUCTION OF

PETITIONER'S MIRANDA-DEFECTIVE STATEMENT INTO EVIDENCE AT HIS STATE COURT TRIAL HARMLESS ERROR STILL OPEN TO LITIGATION, OR IS THE CIRCUIT COURT CORRECT IN TREATING THIS COURT'S REVERSAL AS DICTA?

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IN THE SUPREME COURT OF
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

NOW COMES the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, Timothy A. Baughman, Chief of Research, Training and Appeals, and Jeffrey Caminsky, Assistant Prosecuting Attorney, and pray that a Writ of Certiorari issue to review the judgment of the Sixth Circuit Court of Appeals of the United States of America, entered in this cause on August 12, 1993.

OPINIONS BELOW

The Opinion of the Michigan Court of Appeals is reported at 171 Mich App 234; 429 NW2d 649 (1990), and appended below as Appendix F; the order of the Michigan Supreme Court denying Respondent leave to appeal is reported at 432 Mich 911 (1990); the order of this Court denying a Petition for writ of certiorari is reported at 493 US 956 (1989); the order of the District Court granting the Petition for writ of habeas corpus is unreported as yet, and appended below as Appendix B; the initial opinion of the Sixth Circuit Court of Appeals affirming issuance of the writ is reported at 944 F2d 911 (1990); the opinion of this Court on certiorari is reported at 507 US ___; 113 S Ct ___; 123 L Ed 2d 407 (1993); the order of the Sixth Circuit remanding the cause with directions to issue a retrial order, notwithstanding this Court's opinion, is unreported, and appended below as Appendix A.

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals as issued its order of remand on August 12, 1993. This Court's jurisdiction is invoked under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V to the United States Constitution provides, in pertinent part:

> "No person shall...be compelled in any criminal case to be a witness against himself...."

Amendment XIV to the United States Constitution provides, in pertinent part:

> "...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This is the third time this case has been before the Court on a petition for certiorari: the first time, on Respondent's petition, this Court denied certiorari and permitted Respondent's state court conviction to stand. The second time, on Petitioner's application following the District Court's grant of Respondent's habeas corpus petition, this Court granted certiorari; considering the cause on the merits, the Court affirmed the lower court decision insofar as it considered the District Court's consideration of Respondent's Fifth Amendment Miranda claim, reversed the lower court decision insofar as it was premised upon a consideration of an unraised claim of involuntariness, and remanded for proceedings consistent with the Court's opinion. Docket No. 91-1030, decided April 21, 1993.

On remand, the Sixth Circuit, rather than remanding the cause to the District Court for reconsideration in light of this Court's opinion, remanded the cause with instructions to grant Respondent a retrial. At a special conference in this matter, the District Court determined that it is without authority to issue any order except a retrial order, in light of the specific command of the Sixth Circuit. Accordingly, it is from this remand order that Petitioner seeks certiorari.

Most of the prior facts and proceedings of this cause are outlined in the Court's previous opinion: On October 29, 1985, following a bench trial, the state trial court convicted Petitioner of two counts of first-degree murder, and two counts of felony firearm. On November 6, 1985, the court sentenced Petitioner to two concurrent terms of life imprisonment for murder, and

two consecutive terms of two years imprisonment for felony firearm. On December 18, 1986, following an evidentiary hearing, the trial court vacated one felony firearm count, and denied Respondent's motion for new trial.

On September 7, 1988, the Michigan Court of Appeals affirmed Petitioner's convictions in a published opinion. (R15). Petitioner raised three issues in the appeal: a constitutional claim that the police had failed to give him Miranda warnings; ineffective assistance of counsel; and the adequacy of the trial court's fact findings. (Petitioner's Brief on Appeal, Michigan Supreme Court; see 6thCirJA, 66a-111a). On June 9, 1989, the Michigan Supreme Court denied Petitioner leave to appeal; Petitioner raised only the Miranda and ineffectiveness issues in this application. (R16). On November 9, 1989,

the Supreme Court denied Petitioner's petition for writ of certiorari. Docket No. 89-5191, cert den 493 US 956 (1989). Petitioner had raised only the Miranda issue in his petition. (Petitioner Williams Petition for Writ of Certiorari, Docket No. 89-5191; see 6thCirJA, 198a-215a).

On or about December 7, 1989, Petitioner filed the instant petition for writ of habeas corpus with the District Court. Petitioner claimed three grounds for issuing the writ: a violation of his Miranda rights; a claim that counsel was ineffective for failing to discuss plea bargain offers with him prior to trial; and inadequate fact findings by the trial court. (R1). On October 29, 1990, the District Court issued an order, supported by a 33-page written opinion, reversing Petitioner's conviction on two grounds: (1) the state trial court erred in holding that Petitioner was not in

police custody during his initial statement to police, and that Miranda warnings were therefore not required; and (2) his subsequent statements to police, though preceded by Miranda warnings, were coerced through promises of leniency and were therefore involuntary. (R28). The Court found that the admission of these involuntary statements into evidence at trial required the reversal of Respondent's conviction. (Slip Opinion, 24-27, 32). The District Court entertained no argument before issuing its ruling, and conducted no independent evidentiary hearing. However, the court appeared to base its conclusion on passages cited in two audiotapes, labelled "Rights in Office," (Ibid, 19-20), and "Video," (Ibid, 21-23). These two tapes comprised what the District Court described as the "second interrogation session," following the recitation of Miranda warnings, and formed what the District Court

called the "critical question" in the case. (Ibid, 20). Although finding the evidence against Petitioner "substantial," the District Court determined that the admission into evidence of the statements was not "harmless beyond a reasonable doubt." (Ibid, 26-27, 32).

The state court record of the proceedings discloses the following:

> Following an evidentiary hearing, (R9), and in a written opinion issued on September 27, 1985, the state trial court granted Petitioner's motion to suppress his latter two statements, holding that the police did not have probable cause to arrest him following his initial statement, and that holding him in jail rendered his subsequent statements inadmissible on Fourth Amendment grounds. (See Appendix). Concerning the first statement, and the two suppressed statements, the trial court made the following relevant findings of fact:
>
> > "Romulus police officers investigating two apparent murders heard that Defendant might have

> information about the decedents. They were admitted to Defendant's house by his mother on April 10. He was searched but not handcuffed, and asked to come to the police station for questioning. He was not placed under arrest, but agreed to come with them and to answer questions. After approximately 40 minutes of questioning at the police station, Defendant began to implicate himself. He waived his rights and the questioning continued. He was questioned a second time on April 10, after Miranda warnings and his waiver of rights. Defendant was then lodged in jail. He was given a polygraph examination and questioned a second time on April 11. He was questioned again on the morning of April 12, and was arraigned that afternoon."

The trial court record shows that defense counsel requested that the court listen to the tape of Petitioner's statement at trial, and suggested playing the tape in its entirety. The single audiotape, comprising Plaintiff's Exhibit #10, consisted of Respondent's initial statement to police, on April 10th, and was the only documented statement of

Petitioner's admitted at trial. While the existing record is unclear, this tape apparently consisted of the initial, pre-Miranda statement and a short post-Miranda interlude on April 10th; the trial court record contains no reference to the existence of a second audiotape admitted at trial. However, included in Sgt. Early's testimony was a reference to details, consisting of "throwing out boots, throwing out coats, throwing out guns," that came from "a subsequent interview approximately 15 to 20 minutes after" the one contained in Exhibit 10. (R10, 155-170; R11, 3-6).

On appeal, the Sixth Circuit affirmed issuance of the writ. While acknowledging that the district court's opinion "inexplicably does not mention that the April 11 and 12 statements had already been excluded by the state trial court," the

Circuit Court held that "our conclusion that the inculpatory statements made on April 10 should have been excluded still mandates a new trial," and approved the District Court's finding "that the admission of the April 10 statements was not harmless error." The Circuit Court did not discuss whether the District Court's harmless error analysis was directed to statements which were not admitted into evidence at Respondent's trial, and included a discussion of the voluntariness of the post-Miranda portion of Petitioner's statement to police.

On October 3, 1991, the Sixth Circuit denied Petitioner's motion for rehearing. On April 20, 1992, this Court granted certiorari; on April 21, 1993, the Court affirmed in part, reversed in part, and remanded the cause for further proceedings.

In its opinion, this Court held that

the District Court properly had the jurisdiction to entertain Petitioner's Miranda claim. However, the Court found that the District Court and Sixth Circuit improperly considered the voluntariness of any of Petitioner's statements, in that Petitioner had raised no claim of involuntariness either in his state court appeals, or in the habeas petition. In addition, the Supreme Court noted that the District Court appeared to be under a misapprehension of facts, concerning the number of statements actually admitted into evidence at trial. Accordingly, the court remanded the cause for proceedings consistent with its holdings; on August 26, 1993, the Sixth Circuit remanded the cause with instructions to this Court to modify its judgment, in accordance with the appellate court opinions. In its opinion, the Sixth Circuit directed the trial court

to "act on its grant of the petitioner's writ of habeas corpus with a retrial order to the State of Michigan consistent with the opinions of this court and the Supreme Court."

On remand before the district court, the matter is still pending. However, the district court has determined that the Circuit Court order precludes it from doing anything other than granting a retrial order, and precludes it from considering any issues relating to any post-Miranda portions of the April 10th statement, including those portions which it and the Sixth Circuit found to be involuntary.

Petitioner now seeks certiorari, to vacate the Sixth Circuit order of remand, and to obtain a remand to the District Court that is actually consistent with this Court's opinion on the merits.

ARGUMENT

I.

GIVEN THAT PETITIONER'S PRE-*MIRANDA* STATEMENT WAS LARGELY EXCULPATORY AND WAS REPEATED AFTER *MIRANDA* WARNINGS, AND THAT THE INCULPATORY PORTION OF THE STATEMENT WAS ADMISSIBLE UNDER *OREGON* v *ELSTAD*, 470 US 298 (1985), THE INTRODUCTION OF RESPONDENT'S *MIRANDA*-DEFECTIVE STATEMENT INTO EVIDENCE AT HIS STATE COURT TRIAL WAS HARMLESS ERROR, AND THE SIXTH CIRCUIT ERRED IN PRECLUDING THE DISTRICT COURT FROM INQUIRING INTO THE MATTER.

In its original Opinion, the District Court concluded that Respondent's post-*Miranda* statement to police was inadmissible because it was involuntary, (Slip Opinion, 23-25), and that "because [Respondent]'s inculpatory statements wer involuntary under *Bram*, *Brady*, and the Fifth Amendment, admission of these statements could not be harmless error. (Ibid, 27).

Therefore, the court determined that Respondent was constitutionally entitled to a new trial:

> "This Court has found that inculpatory statements induced by improper promises of leniency were admitted at [Respondent]'s trial. These statements were involuntary under the Fifth Amendment and U.S. Supreme Court precedent. This Court has further found that admission of these statements was not harmless error. This Court feels 'an inevitable and understandable reluctance to exclude an otherwise reliable admission of guilt.' However, this Court is also aware that it is '...not called upon in this proceeding to pass on the guilt or innocence of the [Respondent]'.... Furthermore, the issue of the voluntariness of a confession must be addressed 'with complete disregard of whether or not [Respondent] in fact spoke the truth.' The Constitution requires that no person be convicted on the basis of a confession which is the product of improper threats or promises or coercive conditions. Accordingly,
>
> "IT IS ORDERED that the petition for writ of habeas corpus is conditionally granted....."
>
> (Ibid, 32; citations omitted).

In its opinion on certiorari, this Court unanimously found the District Court's consideration of the involuntariness aspect of the statements to be reversible error:

> "One final point should keep us only briefly. As he had done in his state appellate briefs, on habeas respondent raised only one claim going to the admissibility of his statements to the police: that the police had elicitied those statements without satisfying the Miranda requirements. In her answer, petitioner addressed only that claim. The District Court, nonetheless, without an evidentiary hearing or even argument, went beyond the habeas petition and found the statements Williams made after receiving the Miranda warnings to be involuntary under due process criteria. Before the Court of Appeals, petitioner objected to the District Court's due process inquiry on the ground that the habeas petition's reference to Miranda had given her insufficient notice to address a due process claim. Petitioner pursues the objection here.
>
> "Williams effectively concedes that his habeas petition raised no involuntariness claim, but he argues that the matter was tried by the implied consent of the parties...and that petitioner can demonstrate no prejudice from the District Court's action. The record, however, reveals neither

> thought, word, nor deed of petitioner that could be taken as any sort of consent to the determination of an independent due process claim, and petitioner was manifestly prejudiced by the District Court's failure to afford her an opportunity to present evidence bearing on that claim's resolution. The District Court should not have addressed the involuntariness question in these circumstances." Withrow v Williams, 507 US ___; 113 S Ct ___; 123 L Ed 2d 407, 422-423 (1993)(Citations omitted).[1]

Therefore, while the parties have now fully litigated the Miranda defect this Court found in its earlier opinion, it appears that the District Court must now reexamine its earlier opinion in light of this Court's directive not to consider the claim of

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[1] In light of this basis for reversal, the Court declined to pass upon Respondents claims of failure of exhaustion, or an improper new rule of law under Teague v Lane, 489 US 288 (1989).

Should Respondent seek to press a claim of involuntariness now, the District Court would be bound to dismiss the petition under Rose v Lundy, 455 US 509 (1982).

involuntariness, and reconsider its conclusions accordingly. This, in turn, not only requires the lower court to reexamine its treatment of the matter of harmless error, (see, Slip Opinion, 25-27, 32), but also to revisit the application of Oregon v Elstad, 470 US 298 (1985), to the case at bar, since it distinguished between Elstad and the present case solely on the grounds of the voluntariness of Respondent's subsequent statements. (Ibid, 14-25).[2]

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2 As the Court phrased its inquiry: "[T]he fact that petitioner made unwarned inculpatory admissions in the first interrogation session does not necessarily mean his later, warned admissions are constitutionally defective. That is, the simple fact that these later admissions followed admissions obtained in violation of Miranda does not bar their use. The mere fact that petitioner may have thought the 'cat was out of the bag' does not bar use of his subsequent, warned admissions.

"However, this Court is required to make the voluntariness inquiry outlined in Elstad becfore these subsequent warned admissions can be found to meet the requirements of the Constitution." (Slip Opinion, pp 14-15).

"This Court finds that the promise made to [Respondent] in the interrogation recorded in the "Rights in Office" and "Video" audiotapes, that it he told the truth he would not be charged was improper, misleading, and induced the inculpatory statements he made after receiving Miranda warnings. Consequently, this Court finds these statements to be involuntary under the inquiry mandated in Elstad." (Ibid, 24).

Thus, the District Court initially determined that "[t]he critical question in this case is whether petitioner's admissions in [the] second interrogation session were induced by a police promise of leniency." (Slip Opinion, 20). However, as it was precisely this inquiry that this Court reversed, we must now return to reconsider the case without weaving the barred matter of voluntariness into the equation. Withrow

v Williams, supra at 123 L Ed 2d 422.[3] And reconsidering the matter -- excluding the barred factors and weighing only proper ones -- leads Petitioner to the conclusion that the instant petition should be dismissed, and requires this Court to vacate the inconsistent Sixth Circuit remand order which presently operates to direct a reversal, without consideration of the concerns this Court expressed in its opinion on the merits.

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[3] Given the imprecise wording of the Sixth Circuit's remand order, Petitioner can understand the district judge's apparent confusion concerning the scope of her responsibilities.

However, as the court subdivided its analysis, it analyzed Petitioner's statements into several segments: one, denoted "The First Interrogation Session," concerned the Miranda claim, and involved the interrogation of April 10, 1985. Slip Opinion, p 9. The remainder of the sessions, involving the bulk of the post-

A.

THE HOLDING IN OREGON v ELSTAD, 470 US 298 (1985) MANDATES THE ADMISSION OF THE POST-MIRANDA PORTIONS OF DEFENDANT'S STATEMENT.

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3 Continued
Miranda claims, was analyzed for voluntariness under the heading "Subsequent Interrogation Sessions." Slip Opinion, p 13. Moreover, at several points in its initial opinion, the court took pains to distinguish between "the first interrogation session" and Petitioner's "later, warned admissions." See, eg, Slip Opinion, p 14, 20, 24, 26-27. Considering the Supreme Court's affirmance of the pre-Miranda portion of this Court's opinion, and reversal of the post-Miranda portion, it seems clear that the Sixth Circuit's remand is designed to limit the scope of this Court's inquiry to the post-Miranda port of its analysis only, and to prevent relitigation of the matters settled on certiorari. Petitioner's apparent contrary view -- that the Sixth Circuit remand order precludes inquiry into the post-Miranda portion of the April 10th statement as well, and that this Court should simply enter an order granting a new trial and be done with it -- not only ignores the entire Section III of the Supreme Court opinion, but necessarily presumes that the Sixth Circuit can overrule a decision of the Supreme Court.

In any case, this Court can either treat the Sixth Circuit remand order as ambiguous and imprecise, and proceed in accordance with the Supreme Court's opinion; or it can

Prior to 1985, it remained an open question whether an initial, Miranda-defective statement tainted a subsequent statement obtained following a full recitation of Miranda warnings. This Court settled this point in Oregon v Elstad, supra by holding that a person is not "disabled from waiving his rights and confessing" merely because his confession follows a statement tainted by the lack of Miranda warnings.

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3 Continued
deem itself bound by a remand order in conflict with the controlling Supreme Court holding and directive to undertake "further proceedings consistent with this opinion." Withrow v Williams, supra at 123 L Ed 2d 422. However, in light of the Sixth Circuit's directive to this Court to issue an order "consistent with the opinions of this court and the Supreme Court," it seems clear to Petitioner that the Sixth Circuit does not intend to defy the Supreme Court, and intends this Court's actions to be fully consistent with the controlling holding of the Supreme Court. As the text demonstrates, this requires the Court to proceed with the Miranda defect as a given, and proceed to analyze the case from that point forward -- without considering the factors which caused the reversal.

In this case, Respondent's largely exculpatory pre-Miranda statement indicated that he had given the murder weapon to one Sennett on the night of the killings, "only because he wanted to sell the gun," and first learned of the killings after the fact, when Sennett called to inform him that the guns, and certain clothing worn during the killing were now in the river. (Slip Opinion, 13). After receiving Miranda warnings, Respondent changed his story significantly:

> "In his first unwarned statement, [Responent] had denied being present at the scene of the killings. In his second statement, he admitting driving the Torino and following Sennett, Hooper, and Stanley, who were in Hooper's Volvo. He admitted following them to [the] scene of the murders and turning the car around at Sennett's request. He stated he heard several shots and saw muzzle flashes. He admitted driving Sennett away at Sennett's request and throwing the murder weapon in the river. [Respondent] also admitted helping dispose of clothing Sennett had been wearing. He denied having any knowledge Sennett was going to kill Hooper and Stanley before he saw the muzzle flashes. He also denied having shot the victims." (Slip Opinion, 20).

As the record clearly demonstrates that Respondent received Miranda warnings before making this portion of his statement, (Slip Opinion, 18-20), he may not seek suppression on grounds of a violation of the holding in Miranda v Arizona, 384 US 436 (1966). As the Miranda-defective first statement imposes no bar to waiving his rights for the second statement, the holding in Oregon v Elstad, supra precludes suppression on this basis. And as this Court may not make a voluntariness inquiry in the absence of a duly raised and properly preserved claim of involuntariness, it appears that this Court's in this case bars suppression on this basis. Withrow v Williams, supra at 123 L Ed 2d 422. At the very least, the Court's opinion requires the lower court to reconsider the matter, to see whether suppression is justified on some other basis.

In any case, as there is presently no basis in any prior opinion for suppressing Respondent's second statement, the District Court should not grant a writ on this basis, and this portion of the Court's prior judgment cannot stand without a reexamination of the matter. Given the Sixth Circuit's directive, however, the District Court may not reconsider this point, and has ruled that it without authority to reexamine its prior decision unless and until the Sixth Circuit's remand order is overturned.

B.

GIVEN THE ADMISSIBILITY OF PETITIONER'S SECOND STATEMENT, ANY ERROR IN ADMITTING THE PRE-MIRANDA PORTION OF PETITIONER'S FIRST STATEMENT IS HARMLESS.

While the District Court may not grant a writ upon the subsequent statements which followed full Miranda warnings, the court

must determine whether the error in admitting the Miranda-defective statement was itself error entitling Petitioner to relief. However, for a variety of reasons, it is clear that any such error was harmless,[4] and that the federal courts should therefore dismiss the Petition.

In Arizona v Fulminante, 499 US ___; 111 S Ct 1246; 113 L Ed 2d 302 (1991), this Court found that the improper admission into evidence of a defendant's confession -- even a confession found to be involuntary -- was still subject to a harmless error

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[4] Ironically, despite the fact that this Court's original decision predated the holding in Arizona v Fulminante, 499 US ___; 111 S Ct 1246; 113 L Ed 2d 302 (1991), this Court presumed the need to analyze for harmless error. However, as this Court factored the perceived involuntariness of Petitioner's statements into the harmlessness inquiry -- and apparently was under a misapprehension of fact concerning the number of the "subsequent statements" actually admitted into evidence at trial -- it is clear that the Court must reexamine its conclusions in this regard, as well. Withrow v Williams, supra at 123 L Ed 2d 422.

analysis. Accordingly, we must now examine the trial court error in this case, to determine whether the error will warrant granting Respondent a new trial.

As we have already seen, Petitioner's pre-Miranda statement to police was largely exculpatory: he indicated only that he had given the murder weapon to the killer under innocent circumstances, and learned of the killing well after the fact. (Slip Opinion, 13). However, after receiving Miranda warnings, Respondent changed his story significantly, admitting his presence on the scene, his cooperation with the purported killer, and his complicity in disposing of the evidence. (Ibid, 20). The District Court has already noted that there was "substantial" evidence against Respondent at trial. (Ibid, 27). The lower court also recognized that harmless error occurs where, as here, "there was in evidence one other

lawful confession by the defendant," Slip Opinion, 27, quoting United States v Wolf, 879 F2d 1320, 1323 (CA 6, 1989).

Moreover, the exculpatory nature of the initial statement renders it entirely benign or inconsequential -- while Petitioner's second, inculpatory statement, combined with the testimony of eyewitness James Scamp, along with the numerous witnesses placing Respondent and Sennett together shortly before the killing, provided the evidence that led to his conviction.

Thus, in its initial opinion, the District Court correctly noted that the second statement provided a critical -- though by no means determinative -- piece of evidence, and that Respondent's conviction would stand or fall by the admissibility of his second statement, rather than his first. Since this Court has eliminated the basis for suppressing the second statement,

however, it follows that the admission of the first statement was, at most, harmless error. Arizona v Fulminante, supra; United States v Charlton, 565 F2d 86 (CA 6, 1977). Accordingly, the District Court's proper course on remand is to issue an order dismissing the Petition, in the absence of a counter vailing argument that would otherwise justify a suppression. Since the Sixth Circuit's remand order prevents such further proceedings, however, such further consideration of the matter will be impossible, unless this Court vacates the exant remand order.

C.

THE SIXTH CIRCUIT ORDER OF REMAND, BEING INCONSISTENT WITH THIS COURT'S OPINION AND PRECLUDING THE DISTRICT COURT FROM COMPLYING WITH PART III OF THIS COURT'S OPINION ON THE MERITS, CANNOT FORM THE BASIS FOR THE DISTRICT COURT'S FURTHER PROCEEDINGS AND MUST BE VACATED IN ORDER TO PERMIT FURTHER PROCEEDINGS CONSISTENT WITH THIS COURT'S OPINION.

In its order of remand, the Sixth Circuit specifically directed the District Judge to enter an order of retrial, precluding further inquiry into the admissibility of the April 10th statement despite the fact that this Court directed the lower courts not to consider factors relating to voluntariness in determining whether the Miranda error was harmless.

As this order has the effect of overruling Part III of this Court's opinion, and prevents litigation on the correct application of Oregon v Elstad, supra and Arizona v Fulminate, supra in the absence of a claim of involuntariness -- and, in fact, precludes the District Court from doing anything but reissuing the writ without troubling itself to resolve the issues remaining open -- it is in defiance of this Court's directives and must be vacated. And as further proceedings on remand will depend

upon a correct application of the directly controlling holding of this Court -- and because neither lower court appears willing to apply Section III of the Court's opinion to the case at bar -- Petitioner will be unable to litigate the matter any further, unless this Court vacates the Sixth Circuit's remand order and directs that the case proceed in a manner consistent with the Court's opinion.

RELIEF

WHEREFORE, Respondent prays that this Court grant certiorari, vacate the remand order of the Court of Appeals, and issue a remand order permitting the District Court to make the inquiries needed under Part III of this Court's opinion on the merits.

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Dated: September 21, 1993

JC/eb

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AUG 12 1993

APPENDIX A

No. 90-2289

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Robert Allen WILLIAMS, Jr., Petitioner-Appellee, v Pamela WITHROW, Respondent-Appellant.	ORDER ON REMAND FROM THE UNITED STATES SUPREME COURT

BEFORE: JONES and RYAN, Circuit Judges; and PECK, Senior Circuit Judge.

The United States Supreme Court has affirmed this court's decision that the district court appropriately exercised collateral review in this case. Withrow v Williams, No. 91-1030, Slip op. at 4-14 (US April 21, 1993). Therefore, it remains decided that the district court properly determined that petitioner's statements during his April 10 interrogation must be suppressed. See Williams v Withrow, 944 F2d 284, 288-90 (6th Cir. 1991).

The Court reversed our determination that the district court properly determined that petitioner's statements made after the April 10 interrogation must be suppressed. See Slip op at 14-15; 944 F2d at 290.

Accordingly, we remand to allow the district court to act on its grant of the petitioner's writ of habeas corpus with a retrial order to the State of Michigan that is consistent with the opinions of this court and the Supreme Court.

ENTERED BY ORDER OF THE COURT

Leonard Green, Signed

CLERK

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT ALLEN WILLIAMS, JR.,

Petitioner,

PAMELA WITHROW,

Respondent.

FILED
OCT 29 1990

Case No: 90-CV-70256-DT
HON BARBARA K. HACKETT

MEMORANDUM OPINION AND ORDER

Petitioner, Robert Allen Williams, Jr., presently confined at the Michigan Reformatory in Ionia, Michigan, has filed this pro se application for writ of habeas corpus pursuant to 28 U.S.C. §2254.

PROCEDURAL HISTORY

On October 29, 1985, following a bench trial, Petitioner was convicted of two counts of first-degree murder, and

two counts of felony firearm. On November 6, 1985, Petitioner was sentenced to two concurrent terms of life imprisonment for first-degree murder, and two consecutive terms of two years imprisonment for felony firearm. On December 18, 1986, after an evidentiary hearing, the trial court vacated one felony firearm count and denied Petitioner's motion for new trial.

On September 7, 1988, the Michigan Court of Appeals affirmed Petitioner's convictions in a published opinion. People v Williams, 171 Mich. App. 234, 429 N.W.2d 649 (1989). Petitioner had raised three issues in his appeal. He claimed that his Fifth Amendment privilege against self-incrimination was violated when the trial court failed to suppress a statement he gave to police prior to receiving his Miranda warnings. He also claimed that his trial counsel

was ineffective for failing to advise him of a possible plea offer and that the trial court had not made adequate findings of fact. On June 9, 1989, the Michigan Supreme Court denied Petitioner leave to appeal. 432 Mich. 911. Petitioner raised only the Miranda and ineffective assistance of counsel issues in his application for leave to appeal.

Petitioner filed this application for writ of habeas corpus on January 31, 1990. In his application, he raises the three issues raised in his appeal to the Michigan Court of Appeals.

The respondent has answered and contends that petitioner has raised no issues justifying relief. Respondent claims that petitioner's Miranda rights were not violated because police need not give Miranda warnings to persons subjected to non-custodial police

interrogation and that petitioner was given Miranda warnings as soon as he was put in custody. Respondent states that petitioner's ineffective assistance of counsel claim is meritless because the record does not support his claim that counsel failed to advise him of a plea offer. Finally, respondent defends that petitioner's claim that the trial court made insufficient findings of fact is barred from habeas review by procedural default because he failed to present this issue to the Michigan Supreme Court in a timely fashion. Furthermore, respondent contends, the issue is solely a matter of State law and not cognizable on habeas review.

Issue One, alleging violation of Petitioner's rights under Miranda and the Fifth Amendment is exhausted. Petitioner has raised this issue in his appeals to both Michigan appellate courts. Having

raised this issue, which is well with in the mainstream of constitutional litigation, and having called upon the Michigan courts to examine the entire record, including tape recordings of his statements to the police, petitioner has exhausted this issue.

Issue Two, alleging ineffective assistance of counsel, is also exhausted, as Petitioner has raised this issue before both the Michigan Court of Appeals and the Michigan Supreme Court.

Issue Three, Petitioner's claim that the trial court made inadequate findings of fact is also exhausted. Petitioner presented this issue to the Michigan Court of Appeals which denied relief on this ground in its opinion of September 7, 1988. Petitioner did not, however, present this issue to the Michigan Supreme Court. See, Application for

Leave to Appeal to the Michigan Supreme Court's 56-day rule, M.C.R. 7.302 (C)(3), Petitioner is now barred by this state procedural default. Respondent has raised the defense of procedural default on this issue. Because Petitioner has procedurally defaulted on this particular claim under Michigan state law, he is barred from raising this particular claim as grounds for habeas relief absent a showing of cause for the default and prejudice resulting from the alleged constitutional violation. Murray v Carrier, 477 U.S. 478, 106 S. Ct. 2639, 91 L.Ed.2d 397 (1986). Petitioner has made no such showing. In fact, he has not even alleged any cause for this default, stating incorrectly in his habeas petition that this issue was presented to the Michigan Supreme Court. Consequently, Issue Three, the claimed inadequacy of the trial courts findings

of fact, is barred from habeas review in the present case[1]. Accordingly, this Court will not discuss the merits of this Issue.

FACTUAL BACKGROUND

Van Robin Hooper and Charles David Stanley were shot to death in Hooper's Volvo on a dead end street in Romulus, Michigan. They were shot at close range with a 9mm weapon. An eyewitness, James Scamp, testified that he heard four or five sounds which he first thought were backfires at about 1:10 a.m., April 6, 1985. Scamp was awake in his bedroom at the time. After hearing these noises, he

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1. The rule from Harris v. Reed, 489 U.S. 255, 109 S.Ct. 1038, 1040, 103 L.Ed.2d 308 (1989), that there must be a clear and express finding of procedural default in a state court's judgment before the habeas court will find an issue procedurally defaulted does not apply here. In the present case, the issue in question was not presented to the Michigan Supreme Court at all. Therefore, that court

heard the roaring of a loud car motor which prompted him to go to his window to see if he recognized the car making so much noise. He testified that he saw a back and side view of a person jogging from the passenger side of what later proved to be Hooper's car toward the passenger side of another car. This second car then drove off with its lights off. Scamp stated that it was raining at the time and that he saw this person jogging between the two cars for about three of four seconds from a distance of about ninety feet away. He stated that the person he saw had shoulder length light brown hair, was wearing jeans and a dark colored jacket, and appeared to be

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1. (con't) had no reason to address the issue. The rule from Harris only applies when an issue has been presented to the court whose ruling is being analyzed to determine if that court reached the merits of the issue or relied upon a state procedural default.

wearing white shoes from reflections he saw on the wet pavement. Scamp stated he first thought this person was a female because of the hair, body proportions, and jogging stride. Tr. 11, 33-4

Several witnesses testified that Petitioner and Mark Sennett had been seen in the presence of Hooper and Stanley shortly before the killing. There was testimony that Williams drove off in the Torino following Hooper, Stanley, and Sennett in Hooper's Volvo shortly before the killing. Tr. 90. There was also testimony from Gerald Woods that Williams admitted to his that he had followed Sennett, Hooper, and Stanley in another car and that Sennett had shot Hopper and Stankey, gotten in the car Williams was driving and that Williams and Sennett had driven away together and disposed of the murder weapon.

Detective Sgt. David Early of the Romulus Police testified from memory regarding admissions made by Williams during police interrogation. Early related that Williams admitted he had followed in the Torino while Sennett, Hooper, and Stanley drove to dark one-way street in Romulus. Williams also admitted stopping his car behind Hooper's parked Volvo and turning the Torino around when Sennett walked up to the Torino and told him to do so. Williams stated that Sennett also asked him if he (Sennett) should use a gun or a knife shortly before Sennett admitted he had then driven Sennett away from the scene after the shooting and that he helped Sennett dispose of the murder weapon and clothing Sennett had been wearing. Williams denied having shot Hooper or Stanley. Williams also denied knowing that Sennett planned to kill them before he saw the muzzle flashes while he was turning the Torino around. Tr. 161-63.

After a two day bench trial, the court found Williams guilty of two counts of first degree murder. The court "declined to decide whether [he] was the principal or an aider and abettor." People v. Williams, 171 Mich. App. at 238.

I. MIRANDA AND THE FIFTH AMENDMENT

PETITIONER'S SUBSTANTIVE CLAIMS

Petitioner objected to the admission of the statements he gave the police. He received a Walker[2] hearing in which the admissibility of his statements was decided. At the Walker hearing, petitioner's counsel mainly argued that petitioner had been subjected to unwarned custodial interrogation. Counsel argued that petitioner's statements in response to this unwarned interrogation were

2. People v Walker, 374 Mich. 331, 132 N.W.2d 87 (1965).

inadmissible. He also claimed that later statements in response to warned interrogation were tainted by the prior, unwarned statements. Finally, counsel argued that "promises of leniency" rendered petitioner's statements involuntary, citing People v. Conte, 421 Mich. 704, 365 N.E.2d 648 (1984).[3] Suppression Hearing Transcript (SH Tr.) at 36. As previously discussed, a summary of petitioner statements as related by Sgt. Early was admitted at trial. The Michigan Court of Appeals denied relief on this issue, writing: "The court [below] listened to a tape of the conversation between defendant and Early. The court held that defendant was the focus of the police investigation

3. Conte was decided on the basis of the Michigan state constitution. However, it discusses relevant federal precedent particularly U.S. Supreme Court precedent, at length.

until he made statements incriminating himself and was not in custody until he was read his rights. We cannot say that the trial court's findings were clearly erroneous." People v Williams, 171 Mich. App. 234, 238 (1988).

Petitioner was interrogated at three sessions. Two of these sessions took place on April 10, 1985. One of these sessions took place on April 1, 1985. The two April 10, 1985 sessions have not been transcribed. This Court has scrutinized these confessions by listening to three separate audio tapes labeled "Office" (Session one), "Rights in Office" (Session two), and "Video" (Session two). Each of these audio tapes is about one-half hour long. The fourth session was transcribed. It was also

recorded on videotape.[4] This session was abut fifty minutes long.

Peititoner did not receive any Miranda warnings at Session one. Miranda warnings are only required when a person is subjected to custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.ED.2d 694 (1966). The state trial court found that petitioner was not in custody at this session and the Michigan Court of Appeals found this ruling was not clearly erroneous. This does not resolve the matter, however.

This Court believes that it must make an independent determination of whether or not petitioner was in custody during interrogation session one. In

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4. The audiotape labelled "Video" of April 10, 1985, and the videotaped session dated April 12, 1985, which has been transcribed are definitely not the same session.

making this determination, this Court believes that the State court's subsidiary findings of fact a presumption of correctness. 28 U.S.C. §2254(d). For example, a finding that petitioner was not told he was free to go, would be a subsidiary finding of fact. However, this Court believes that the overall question of whether petitioner was in custody is a mixed question of fact and law which requires an independent federal determination. Furthermore, as an analysis of the tape recording of session one will reveal, this Court also believes that if, arguendo, the custody question is a fact question subject to the §2254(d) presumption of correctness, this particular state court finding is so completely devoid of support in the record that the presumption is overcome. 28 U.S.C. §2254(d)(8).

The Supreme Court has established the test for determining custody for Miranda purposes. In Miranda the Court wrote that:

> By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Miranda, Id. at 444.

In Berkermer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), the Court ruled that the test for determining custody is objective. The Court wrote: "... the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." Berkemer, Id. at 34-5. That is, the relevant inquiry is whether a reasonable man in the suspect's position would believe that he was in custody, i.e. not free to go.

THE FIRST INTERROGATION SESSION

On April 10, 1985, Sgt. Early and Sgt. Ondejko went to petitioner's house to bring him in for questioning. They asked petitioner if he would come with them to the police station and he agreed. He was brought to the police station by these two officers in an unmarked police car. Early testified that petitioner was not arrested at his house.[5] There is no indication that petitioner was ever told he was free to go or that he was not under arrest during the first interrogation session.

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5. At the Walker hearing, Early was impeached with a copy of a police computer printout which stated Williams was arrested at his residence. Early acknowledged the printout reported Williams was arrested at his home, but stated this was incorrect. Hearing Tr. at 14.

After arriving at the Romulus police station, petitioner was taken to a room where he was questioned by early and Ondejko. Petitioner was not accompanied by any friends, relatives, or counsel. The interrogation session began as follows:

Early:	"For starters, you've got big problems."
Williams:	"Big problems. You got people that are gonna testify that put you with this gun.[6] That are gonna testify that you had it, where you had it.
Ondejko:	There's gonna be two life sentences here. This ain't no game.

6. That is, the murder weapon. Romulus police were able to establish through a combination of testimonial and physical evidence that immediately before the murders Williams had possession of the gun which fired the bullets that killed Hooper and Stanley. Williams also admitted this in his statements. He later claimed he had given Sennett the gun shortly before the killings because he wanted Sennett to help him sell it.

Early: We're about that far tight now from getting a warrant for you. You may not have been the shooter. You supplied the gun and know what happened. We think you were probably there and we think we can prove it.

Williams: Nope. I wasn't there.

Early: But the main thing on this is we want the shooter. We're not real interested in who was there or who was along for the ride or anything else. We get the shooter on this and we're gonna pretty well be content.

Session One, Audiotape labelled "Office", Counter between approximately 028 and 079.

The tone of these police statements was serious and accusatory. After this exchange, police continued questioning petitioner, asking him if he had been at the scene of the murders, where he had been the night of the murders, and how Sennett had gotten the gun. Petitioner

continued to deny he had bene at the scene of the killings and stated he did not know how Sennett got the gun.

A few minutes later Ondejko asked Early in a low voice, "Did you read him his rights?" Early replied in a hushed, lower voice, "Not yet."

Shortly afterwards Early made the following statement to petitioner:

> You know everything that went down. You just don't want to talk about it. What it's gonna amount to is you can talk about it now and give us the truth and we're gonna check it out and see if it fits or else we're simply gonna charge you and lock you up and you can just tell it to a defense attorney and let him try and prove differently. We're not playing. We've been chasing around on this too fuckin' long. ("Office" Audiotape.)

The tone of this statement was again severe and accusatory. This last exchange offered petitioner the choice of answer-ing his interrogators' questions or being formally charged. Furthermore,

the police had indicated to petitioner that he had "big problems," that they were "that far right now from getting a warrant for you." Moreover, petitioner had been told that there were witnesses who would testify of his connection to the murder weapon. He also had been told police believed he had been at the scene when the killings occurred and that they thought they could prove it. Petitioner may have been in custody as soon as he was told these facts. This Court believes he was definitely in custody when he was told that he had a choice between answering his interrogators' questions and being formally charged and locked up. This choice did not leave petitioner free to go. It gave him the choice of surrendering his right to remain silent or being formally arrested. This was a significant deprivation of his freedom of action. A reasonable person

in this position would have believed he was in custody at this time.[7]

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7. In Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977), the Supreme Court ruled that police interrogation is not necessarily custodial simply because it occurs in the station house. In Mathiason, a parolee was suspected of committing a burglary. Twenty five days after the burglary, the investigating officer left his card at the suspect's apartment together with a note stating he would "'like to discuss something'". Id. at 493. The next day the suspect called the officer on the phone and agreed to come to the station. When the suspect arrived at the state patrol office about two blocks from his home he was told he was not under arrest. He was not given Miranda warnings.

The suspect was told that police believed he had been involved in the burglary and was also told (falsely) that his fingerprints had been found at the scene. A few minutes later, the suspect admitted he had taken the property. The Court ruled that Mathiason had not been in custody at that point.

In a similar case, California v. Beheler, 463 U.S. 1121, 103 S.Ct. 3517, Title 2d 1275 (1983), the Court reached the same conclusion. Beheler had called the police and "voluntarily agreed to accompany police to the station house, although the police specifically told [him] that he was not under arrest." Id. at 1122. Beheler was questioned for about 30 minutes and allowed to go home. The Court ruled that he was not in custody during this period of questioning.

Petitioner should have been given Miranda warnings at this time. However, he was not. Questioning continued an petitioner admitted that he had given Sennett the murder weapon the night of the killings. Petitioner claimed that he had done this only because he wanted to sell the gun. Petitioner also stated that Sennett had called him after the killings and had told him the gun and the clothes were in the river. Petitioner continued to deny that he had been present at the murder scene. The police continued to suggest that they were

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7. (con't)
This Court believes the present case is distinguishable from Mathiason and Beheler. Petitioner was taken to the station house by police officers upon their initiative, not his. He was never told he was not under arrest. He was told witnesses linked him to the murder weapon and given the choice of answering police questions or being formally charged and locked up. Taken as a whole, these facts show that petitioner was in custody during his first interrogation session.

interested only in finding the shooter. This session ended with the police telling petitioner he was holding something back and lying himself into a corner. Thus, tis Court finds that petitioner made several damaging admissions in response to unwarned, custodial police interrogation.

SUBSEQUENT INTERROGATION SESSIONS

Petitioner was subjected to two additional interrogations, one session recorded on two audiotapes dated April 10, 1985, and another session on April 12, 1985, recorded on videotape and transcribed. At each of these last two sessions, petitioner was given Miranda warnings at the beginning of the session. Each time he was asked if understood his rights and each time he either explicitly answered in the affirmative or continued on his own initiative to discuss matters

with his questioners. He made additional incriminating statements at these subsequent sessions, reiterating and going beyond the admissions he made at the first, unwarned session.

This presents the question of whether petitioner's first, unwarned admissions tainted his subsequent, warned admissions.

In Oregon v Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), the Supreme Court ruled that:

> [A] suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the prerequisite Miranda warnings.

Id. at 318

Thus, the fact that petitioner made unwarned inculpatory admissions in the first interrogation session does not necessarily mean his later, warned

admissions are constitutionally defective. That is, the simple fact that these later admissions followed admissions obtained in violation of Miranda does not bar their use. The mere fact that petitioner may have thought the "cat was out of the bag" does not bar use of his subsequent, warned admissions. Id. at 311-13.

However, this Court is required to make the voluntariness inquiry outlined in Elstad before these subsequent warned admissions can be found to meet the requirements of the Constitution. The voluntariness of a confession is determined by an analysis of "... the surrounding circumstances and the entire course of police conduct with respect to the suspect ...." Elstad, Id. at 318. "[T]he Court's confession cases hold that the ultimate issue of 'voluntariness' is a legal question requiring independent

federal determination." Miller v Fenton, 474 U.S. 104, 112 106 S.Ct. 445, 88 L.Ed.2d 405 (1985). Therefore, this Court will conduct a de novo review of voluntariness.

Discussing the admissibility of confessions under the Due Process Clause, Justice Frankfurter wrote that:

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.
>
> Culombe v. Connecticut, 367 U.S. 568, 602, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1960)

Factors to be considered in making this determination include the duration and conditions of detention, the attitude of the police toward the suspect, the age, mental state, intelligence, and

education of the suspect, as well as the awareness of the suspect of his constitutional rights. Id., See also, Schneckloth v. Bustamonte cite cases where a particular factor stood out while noting that the totality of circumstances must be considered. Elstad also notes that a statement must be voluntary "within the meaning of the Fifth Amendment" to be admissible, Elstad, supra, at 315, and suggests that "threats or promises" made by police are factors to consider in analyzing voluntariness. Id. at 302.

VOLUNTARY ANALYSIS OF PETITIONER'S SUBSEQUENT STATEMENTS

Petitioner was given Miranda warnings at the beginning of the second interrogation session. At the state suppression hearing, Sgt. Early testified that there was no indication petitioner

was under the influence of drugs or alcohol. SH Tr. at 9. There is no testimony on the record as to petitioner's age or education. However, this Court has listened to three audiotapes and viewed one videotape of the interrogation sessions. On the videotape, petitioner appears to have been about 30 years old. While this is only an estimate, it is clear that he was not particularly youthful. He was not a boy, or even a very young man. Furthermore, petitioner testified that he had six prior felony convictions for breaking and entering, and receiving and concealing stolen property. SH Tr. at 21. Sgt. Early testified that petitioner was lucid. This is supported by the four recordings and one transcript of the sessions. The three April 10, 1985, sessions are each about one-half hour long. These factors tend to indicate that any admissions petitioner made were voluntary.

However, there is an additional factor which must be considered in this case. A suspect's will can also be overborne by promises or inducements. In Brady v United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), Justice White, writing for the majority, discussed this issue as follows:

> Bram v. United States, 168 U.S. 532 (1897), held that the admissibility of a confession depended upon whether it was compelled within the meaning of the Fifth Amendment. To be admissible, a confession must be 'free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.' 168 U.S. at 542-543. More recently, Malloy v. Hogan, 378 U.S. 1 (1964), carried forward the Bram definition of compulsion in the curse of holding applicable to the States the Fifth Amendment privilege against self-incrimination.
>
> Brady, Id. at 753

Brady, who was advised by competent counsel before entering his plea, had pleaded guilty to a kidnapping charge where the victim had not been released

unharmed. Brady claimed that his plea was involuntary because the pertinent statute provided that maximum penalty after a guilty plea was life imprisonment, while a guilty verdict after jury trial could result in a death sentence. Brady claimed that under Bram this amounted to an improper promise of leniency which rendered his guilty plea involuntary. Justice White explained why Bram did not control Brady's case:

> Bram is not inconsistent with our holding that Brady's plea was not compelled even though the law promised him a lesser maximum penalty if he did not go to trial. Bram dealt with a confession given by a defendant in custody, alone and unrepresented by counsel. In such circumstances, even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess. But Bram and its progeny did not hold that the possibly coercive impact of a promise of leniency could not be dissipated by the presence and advice of counsel, any more that Miranda v Arizona,

> held that the possibly coercive atmosphere of the police station could not be counteracted by the presence of counsel or other safeguards.

Brady, at 754 (citations and footnotes omitted, emphasis added)

In the present case, Sgt. Early was asked at the suppression hearing if any promises had been made to petitioner. He answered as follows:

> The only promise or statement of that type given Mr. Williams was that if he was only a witness with no involvement, he most likely would not be charged in the case, but then subsequently [it] came to the point where he was definitely more than a witness, and also polygraph examination was involved. We stated that he would have to pass polygraph examination and [he] did not.

SH Tr. at 8-9.

Petitioner was given Miranda warnings at the beginning of the second interrogation session. After Miranda warnings were given, the following exchange took place:

> Early: Do you understand your rights that I've explained to you?

Williams: What does this mean?

Early: You're being charged with murder in the first.

Williams: Why?

Ondejko: Because you won't level with us.

Early: Do you understand your rights?

Williams: Yeah. (nearly inaudible after a long pause).

Early: Do you wish to make any further statements at this time?

Ondejko: Do you wish to change your story? (softly)

Williams: What difference is it going to make?

Ondejko: It's gonna make a lot of difference to you.

Early: I told you. If you told the truth (Stops abruptly when interrupted by Williams).

Williams: (interrupting Early) I've been telling you the truth.

Early: Oh, you've been making up fairy tales ever since you've been in here. You're giving us, like he says, parts of the truth, parts of what you want us to

believe, and part of what really happened. (angrily).

Williams: If I tell you everything that happened, I'm gonna walk outta here, huh?

Ondejko: Someday you may stand a chance of walking.

Early: I'll make you a deal. You tell us everything that happened and you tell us the truth and I confirm it on a polygraph that you're telling us the truth. Yeah, you walk.

Audiotape labelled "Rights in Office", Counter reading between 090-120.

Early then explained that a polygraph test would have to be given the next day. He then told petitioner, "Tomorrow you can walk out of here if you're telling me the truth." Id.

Shortly after this discussion, petitioner changed his story, making several additional damaging admissions. In his first unwarned statement, petitioner had denied being present at

the scene of the killings. In his second statement, he admitted driving the Torino and following Sennett, Hooper, and Stanley, who were in Hooper's Volvo. He admitted following them to scene of murders and turning the car around at Sennett's request. He stated he heard several shots and saw muzzle flashes. He admitted driving Sennett away at Sennett's request and throwing the murder weapon in the river. Petitioner also admitted helping dispose of clothing Sennett had been wearing. He denied having any knowledge Sennett was going to kill Hooper and Stanley before he saw the muzzle flashes. He also denied having shot the victims.

The critical question in this case is whether petitioner's admissions in this second interrogation session were induced by a police promise of leniency. It should be noted that a repeated theme

in the first, unwarned session was that the police were basically interested in getting the shooter. After promising petitioner that he would "walk" if he told them the truth, petitioner was encouraged to "open up and lock him [Sennett] up, that's all." Audiotape, "Rights in Office" at counter 167-8.

In the context of this uncounseled interrogation, following a session where police had obtained unwarned admissions and repeatedly suggested that they were only interested in finding out who the actual shooter was, this Court finds that the statement that petitioner would "walk" if he told the truth constituted a promise of leniency sufficient to overcome petitioner's will and render his admissions involuntary. As Justice White indicated in Brady, "[i]n such circumstances, even a mild promise of leniency [may be] sufficient to bar the con-

fession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess." Brady, supra, at 754.

It may be asserted that Early's promise that petitioner would "walk" did not constitute a promise of leniency, that it is too ambiguous to be so considered. This Court does not believe this to be the case, even on the basis of the "Right in Office" tape alone. However, this Court need not rely on its interpretation of this tape alone. In a third tape, labeled "Video"[8]

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8. No additional Miranda warnings were given at the beginning of this third tape. The tape is dated April 10, 1985. No time of day is indicated. This interrogation clearly follows the interrogation recorded on the "Rights in Office" tape because it refers to statements made on that tape. Although it has been given

after noting that petitioner had been read his rights and that he still made a statement, Sgt. Early elaborated on the promise that had been made to petitioner as follows:

Early:	You're worried now about us turning this around on you and charging you too. We've said that basically we ant you as a witness. Right?
Williams:	Yes
Early:	Alright, I'm gonna tell you right now, at the start of the recording, if we use this recording against you, it's got to be in its entirety. We can't edit it or cut it. We told you if you are a witness to this and if you are telling the truth, and if you are willing to testify, then we are not going to charge you as a

8. (con't) a different title and is on a separate tape, it should probably be considered a continuation of the same interrogation session recorded on the "Rights in Office" tape. (Although the tape is labelled "Video", it does not follow interrogation session recorded on videotape. The videotaped session is dated April 12, 1985).

co-defendant. That's what we told you, right?

Williams: Yes.

Early: Alright. We're still gonna go by that agreement. And I don't. [abrupt stop]. You've been around, but if, whether you're up on the law, if a police officer makes an agrement like that it's got to be honored. You can go to court and say we made that agreement and we backed down on it and we can't present these tapes and use anything else we've got. So it's an agreement we have to stick to by law. I can't promise you anything and then turn around and back out of it and use it against you.

Williams: O.K.

Early: Right now you're a witness to the crime. But we ant the truth. If you start lying to us and you start playing games, yeah, we're gonna charge you. A witness doesn't do us any good unless he tells the truth. We're not trying to hang anybody with this, we're still gonna put

you on a polygraph and you're gonna have to show us you're telling the truth and you're not being charged. That fair enough?

Williams: Yeah.

Audiotape labelled "Video" at 028-068.

The federal courts have not interpreted Bram liberally. Bram does not preclude counseled guilty pleas, although these often involve at least implied promises of leniency or pleas to less than maximum possible charges. Brady, supra, at 752-53. "An interrogating agent's promise to inform the government prosecutor about a suspect's cooperation does not render a subsequent statement involuntary, even when it is accompanied by a promise to recommend leniency or by speculation will have a positive effect". U.S. v. Leon Guerreri, 847 F.2d 1363, 1366 (9th Cir, 1988). Mere exhortations to tell the truth do not render a confession

involuntary. Crooker v. California, 357 U.S. 433, 437 78 S.Ct. 1287, 2 L.Ed.2d 1448 (1958). Nor does a promise that a statement will not be used by one sovereign render its use by another sovereign involuntary. U.S. v. Long, 852 F.2d 975 (7th Cir. 1988).

In Long, the court noted that the often repeated quote from Bram that a confession is involuntary if it is "obtained by any direct or implied promises, however slight, [[or] by the exertion of any improper influence", Bram, 168 U.S. at 542-43, had not been applied to establish a per se rule. The court noted what it considered to be a more accurate statement of the rule as follows:

> ...where the other circumstances surrounding the confession do not suggest that the defendant's will was overborne...improper of misleading inducements make a

> confession involuntary. For example, leading the defendant to believe that he or she will receive lenient treatment when this is quite unlikely is improper, whereas making a promise to bring the defendant's cooperation to the attention of the prosecutor or to seek leniency, without more, is not. (Citations omitted).

Long, 852 F.2d at 978.

In the present cas, the police went far beyond mere exhortations to tell the truth. They simply did not state that they would inform the prosecutor of any cooperation by petitioner and recommend leniency accordingly. Rather, after indicating several times that they were basically interested in knowing who the shooter was, the police promised petitioner that if he told them the truth about the crime he would not be charged. They made this promise to petitioner after acknowledging that they had witnesses who linked him to the murder weapon and stating they believed they could prove he was at the murder scene.

It was indeed, "quite unlikely" that petitioner would "walk" and not be charged at this time. Furthermore, this promise was made after having obtained unwarned admissions, thereby "exploit[ing] the unwarned admission to pressure [petitioner] into waiving his right to remain silent". Elstad, supra, at 315. This Court finds that the promise made to petitioner in the interrogation recorded in the "Rights in Office" and "Video" audiotapes, that if he told the truth he would not be charged was improper, misleading, and induced the inculpatory statements he made after receiving Miranda warnings. Consequently, this Court finds these statements to be involuntary under the inquiry mandated by Elstad. These statements should not have been admitted at petitioners trial.[9]

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9. The fact that the police conditioned their promise of leniency upon verification by polygraph and that petitioner failed the polygraph test does not render his statements

Petitioner was interrogated again on April 12, 1985. This session was recorded on videotape and transcribed in writing. Petitioner was given Miranda warnings at the beginning of this session. In this session, petitioner was told that because he had not passed a polygraph exam given on April 11, 1985, he could be prosecuted. He was told that the question of his prosecution was "far from open and shut". Interrogation Transcript (Int. Tr.) at 1. After being told he had not passed the polygraph exam he was encouraged to submit to further questioning to see if "[m]aybe we can clear that up". (Int. Tr) at 2.

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9. (con't) voluntary. The promise of leniency had already had its intended effect and prompted petitioner's inculpatory statements before the polygraph test was given. The fact that the promise he would not be charged if he told the truth induced petitioner to both make inculpatory statements and to submit to a polygraph exam hardly renders the promise less coercive.

In this session, petitioner essentially repeated the admissions and denials he had made in previous sessions. This session is another warned interrogation subsequent to the initial, unwarned session. However, the admissions made in this session cannot be found to be constitutional under the Elstad doctrine, because the admissions made in this session also follow the involuntary admissions made in the "Rights in Office" and "Video" session. This April 12, 1985, session did not simply follow an unwarned, but voluntary inculpatory statement. Rather, it followed a warned, but involuntary inculpatory statement, induced by an improper promise of leniency.

Confessions subsequent to an involuntary confession are not per se inadmissible. However, there must be a "break in the stream of events... sufficient to insulate" the subsequent

confession from the coercive effect of the prior involuntary confession. Darwin v. Connecticut, 391 U.S. 346, 349, 88 S.Ct. 1488, 20 L.Ed.2d 630 (1968). There is no indication that this occurred in the present case.

The admissions made by petitioner in this last, warned interrogation session were attempts on his part to "clear up" areas where he had failed the April 11, 1985, polygraph test. His uncounseled submission to this polygraph test was itself induced by the same improper promise of leniency which prompted his admissions after receiving Miranda warnings. Thus, this last interrogation session was, in fact, a part of the "stream of events" begun by the promise of leniency made to petitioner. Consequently, petitioner's inculpatory statements made at the April 12, 1985,

interrogation are not admissible under Darwin. See also Clewis v. Texas, 386 U.S. 707, 710 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967), (stating that to be admissible, a confession made following an involuntary confession must be "insulate[d]...from the effect of all that went before.").

A panel of the Sixth Circuit has recently written that it believed Supreme Court precedent allowed application of harmless error analysis to erroneous admission of an otherwise voluntary confession obtained in violation of Miranda and its progeny, but not to a coerced confession. U.S. v. Wolf, 879 F.2d 1320, 1323-24 (6th Cir. 1989). This Court agrees. Consequently, this Court believes that because petitioner's inculpatory statements were involuntary under Bram, Brady, and the Fifth Amendment, admission of these statements could not be harmless error.

Furthermore, even where harmless error analysis applies to an unlawfully obtained confession, "'the admission of an unlawful confession [is] harmless only in limited instances, such as where there was in evidence one other lawful confession by the defendant.'" Wolf Id. at 1324, quoting Christopher v. Florida, 824 F.2d 836, 846 (11th Cir. 1987). There were no lawful confessions admitted in this case. Moreover, the other evidence against petitioner at trial, while substantial, was not massive or overwhelming. No witness was able to identify petitioner as being present at the scene of the murders. Petitioner was linked by testimony to the murder weapon and to the victims. If, arguendo, harmless error analysis did apply to the admission of petitioner's inculpatory statements, this Court could not find that admission of those statements was

"harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner has alleged that his trial counsel failed to inform him of a plea offer made by the prosecutor. He claims that this alleged failure deprived him of the effective assistance of counsel. The right to effective assistance of counsel extends to decisions of whether or not to accept plea offers. Turner v. State of Tennessee, 858 F.2d 1201, 1205 (6th Cir. 1988). Failure to communicate a plea offer can constitute ineffective assistance of counsel. Williams v. Arn, 654 F.Supp. 226, 237 (N.D. Ohio 1986). Hence, this claim is cognizable in habeas corpus. The overall issue of the effectiveness of counsel is a mixed

question of law and fact. Therefore, state court findings on the ultimate issue are not entitled to a presumption of correctness. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The Michigan Supreme Court ordered the trial court to make findings of fact on this issue. The trial court held an evidentiary hearing on August 26, 1986, to determine whether the prosecutor did indeed make a plea offer to petitioner and whether trial counsel communicated any such offer to petitioner. Testimony was taken from petitioner, trial counsel Martin Marcus, appellate counsel Suzanne Schuelke, and the assistant prosecutor at trial, Robert Agacinski. The hearing transcript is eighty-seven pages long.

The trial court judge made detailed findings of fact after this hearing. These findings are summarized as follows:

> ...it was undisputed some unknown prosecutor, at some unsure place, offered to recommend that defendant receive a 20-year minimum, and it was clear that the defendant did turn this down as he himself testified to. It is subsequent to this time that the Supreme Court apparently wants this Court to make findings of fact as to the content of the conversations between defendant's trial attorney and the assistant prosecutor who actually tried the case. Testimony was taken by this Court in this regard and there was some dispute as to the content of the conversations. This Court did indicate that defendant's counsel, Mr. Marcus, gave highly suspect testimony because of the fact that he was impeached, was not sure and changed his mind, at various times, while the testimony of assistant prosecutor who tried the case was clear and direct. It is clear, from all the testimony of the convulsants, that there never was a clear offer to defendant's counsel that there would be a sentence recommendation of a 15-year minimum term. It is obvious to this Court that it was just talk and if the defendant had indicated a willingness to plead guilty with a sentence recommendation of a 15-year minimum term, that the assistant prosecutor would take it to his superior. Specifically, in regard

> to the conversations between the defense counsel and the assistant prosecutor, it is clear from the testimony that was taken before this Court there never was an offer of a 15 year minimum term. It was all merely conversation.
>
> Findings of Fact on Remand from the Michigan Supreme Court at 1-2 (emphasis added).

The trial court also found that "[whether defendant's counsel accurately reported the contents of these 'off-the-cuff' conversations will never be absolutely certain inasmuch as the attorney has indicated that he just doesn't remember although he knows there were some conversations]". Id. at 3. Thus, the trial court did not make an explicit finding as to whether counsel informed petitioner of these plea "conversations" which it did not consider a plea offer.

Thus, the trial court found that no plea offer was made. This finding is supported in the record and is entitled

to a presumption of correctness. 28 U.S.C. 2254(d). Ordinarily, such a finding would be dispositive of this issue, for if no plea offer has been made, failure to communicate preliminary discussion or "conversations" is not ineffective assistance of counsel. Williams v. Arn, supra, at 242.

This would apparently overrule the trial court's finding that no offer had been made. However, the court went on to state further:

> Because the offer was conditional, we believe that defendant could demonstrate that an offer was made by proving by a preponderance of the evidence that he would have accepted a fifteen-year sentence and that [prosecutor] Kenny would have approved the same....We find defendant's proof concerning Kenny's approval on the offer lacking. Marcus conceded that Kenny refused to offer less than a twenty-year sentence given the heinous nature of the crimes. At most, Marcus testified that he hoped that Agacinski could convince Kenny to go lower.

Id.

Thus, the Michigan Court of Appeals wrote that a conditional offer was made, that one condition of the offer was prosecutor Kenny's approval, and that petitioner failed to prove the existence of that condition. While this seems to be inherently contradictory, resolving this contradiction is not essential, for petitioner must not only prove that a plea offer was made, he must also prove that counsel was incompetent, i.e., that counsel did not communicate this plea to petitioner, and that this incompetence prejudiced petitioner. To establish the required prejudice, petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, supra, at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome."

This Court finds that both the trial court and the Michigan Court of Appeals agreed that petitioner failed to prove that Kenny, or any other prosecutor, would have approved a plea bargain for petitioner other than the twenty-year minimum sentence which he rejected. The Court of Appeals specifically wrote that Marcus, petitioner's trial counsel "conceded that Kenny refused to offer less than a twenty-year sentence given the heinous nature of the crimes. At most [Marcus] testified that he hoped that Agacinski could convince Kenny to go lower." People v. Williams, supra, at 242. Therefore, this Court finds that petitioner cannot satisfy the prejudice prong of Strickland. Even if, arguendo, a conditional plea offer was made and further assuming, arguendo, that Marcus failed to inform petitioner of this, satisfying the incompetence prong, petitioner cannot show that this incompetence prejudiced him.

In the particular circumstances of this case, petitioner would have to show some reasonable probability that Kenny would have approved a plea bargain of less than twenty years to undermine this Court's confidence in the result of the proceeding. Yet, the Michigan courts have already found as a factual matter that petitioner failed to do this. These findings are supported in the record and are entitled to a presumption of corrcteness. 28 U.S.C. §2254(d). Petitioner is not entitled to relief on this issue.

CONCLUSION

This Court has found that inculpatory statements induced by improper promises of leniency were admitted at petitioner's trial. These statements were involuntary under the Fifth Amendment and U.S. Supreme Court

precedent. This Court has further found that admission of these statements was not harmless error. This Court feels an "inevitable and understandable reluctance to exclude an otherwise reliable admission of guilt." Miller v. Fenton, supra, at 117. However, this Court is also aware that it is "...not called upon in this proceeding to pass on the guilt or innocence of the petitioner of the atrocious crime that was committed." Davis v. North Carolina, 384 U.S. 737, 739, 86 S.Ct. 439, 15 L.Ed.2d 358 (1966). Furthermore, the issue of the voluntariness of a confession must be addressed "with complete disregard of whether or not petitioner in fact spoke the truth." Rogers v. Richmond, 365 U.S. 534, 544, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961). The Constitution requires that no person be convicted on the basis of a confession which is the product of improper threats or promises or coercive conditions. Accordingly,

IT IS ORDERED that the petition for writ of have as corpus is conditionally GRANTED. Unless the State takes steps to provide petitioner with a new trial within 90 days of the date of this Order, or, should it be appealed, within 90 days of the date of affirmance on appeal, should that be the result, a writ of habeas corpus unconditionally discharging petitioner from custody on the basis of the sentence imposed in this case will be issued.

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BARBARA K. HACKETT

UNITED STATES DISTRICT JUDGE

Dated: